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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75- **1084**

BIRDIE MAE DAVIS, EDWIN FOSTER, and JAMES E. BUSKEY, et al.,

Petitioners,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.,

ALFREDO G. PARRISH, et al.,

Petitioners,

v.

BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on August 21, 1975, October 2, 1975, and December 4, 1975.

Opinions Below

1. *Davis v. Board of School Commissioners*

The opinion of the court of appeals is reported at 517 F.2d 1044, and is reproduced in the Appendix at pp. 5a-

14a. The order of the court of appeals denying rehearing is reported at 517 F.2d 1044, and is reproduced in the Appendix at p. 15a. The order of the district court is unreported and is reproduced in the Appendix at pp. 1a-4a.

2. *Parrish v. Board of Bar Commissioners*

The opinion of the court of appeals *en banc* is reported at 524 F.2d 98, and is reproduced in the Appendix at pp. 36a-52a. The earlier opinion of the panel of the court of appeals is reported at 505 F.2d 12, and is reproduced in the Appendix at pp. 19a-35a. The order of the court of appeals withdrawing the panel opinion is reported at 509 F.2d 540. The order of the district court is unreported and is reproduced in the Appendix at pp. 17a-18a.

Jurisdiction

1. *Davis v. Board of School Commissioners*

The judgment of the court of appeals was entered on August 21, 1975; a timely petition for rehearing was denied on October 2, 1975. On December 23, 1975, Mr. Justice Powell signed an order extending the time for the filing of this petition until January 30, 1975 (No. A. 560). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

2. *Parrish v. Board of Bar Commissioners*

The judgment of the court of appeals sitting *en banc* was entered on December 4, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

A single petition for a writ of certiorari seeking review in both cases is being filed pursuant to Rule 23(5) of this Court, since the issues raised by these cases are closely related.

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Question Presented

Did the Court of Appeals apply the proper standards under 28 U.S.C. § 455 and 28 U.S.C. § 144 in holding that two federal district judges properly declined to recuse themselves?

Statutory Provisions Involved

Section 144, 28 U.S.C., provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Section 455, 28 U.S.C., provides in pertinent part:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

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> (c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

Prior to the 1974 amendment, 88 Stat. 1609, 28 U.S.C. § 455 provided:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

Statement of the Case

This petition seeks review of two decisions of the Fifth Circuit in which the standards for recusal of a district judge under 28 U.S.C. § 144 and the 1974 amendments to 28 U.S.C. § 455 were determined. The procedural history and facts of the two cases will be described separately.

A. *Davis v. Board of School Commissioners*

Davis is a school desegregation case originating in the Southern District of Alabama involving Mobile, Alabama. Following the decision of this Court in 1971, 402 U.S. 33, a desegregation plan was entered by stipulation of the parties. In 1974 petitioners Edwin Foster and James E. Buskey, both black assistant principals, were permitted to intervene in *Davis* to seek relief against alleged discrimination in promotions by the Mobile School Board.[1] Counsel

[1] See the Court of Appeals' decision at pp. 7a-8a.

for both intervenors was James U. Blacksher, also counsel for the original plaintiffs in the school desegregation case; his co-counsel are attorneys employed by the NAACP Legal Defense and Educational Fund, Inc., an organization whose main purpose is the support of litigation brought under the various civil rights acts and the Constitution to establish and enforce the rights of black citizens.[2] The judge to whom the case was then assigned was the Hon. William Brevard Hand.

On September 27 and November 20, 1974, respectively, petitioners Foster and Buskey filed essentially identical motions and affidavits pursuant to 28 U.S.C. § 144, seeking recusal of Judge Hand. The affidavits were based primarily on an opinion entered by Judge Hand one month earlier in an entirely different civil rights case in which Mr. Blacksher and the Legal Defense Fund attorneys were also involved, *Robinson* v. *Union Carbide Corp.*, 380 F.Supp. 731 (S.D. Ala. 1974). In *Robinson* aggressive private enforcement of public policies which "Congress considered of the highest priority," *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968), was condemned by Judge Hand as "perfidy". P. 56a. Concerted activity to vindicate through litigation the civil rights of blacks, accorded First Amendment protection by *NAACP* v. *Button*, 371 U.S. 415 (1963), was attacked by Judge Hand as a "tragedy" entailing "the destruction of the high quality of the legal profession." P. 57a. The affidavit of petitioner Foster and the relevant portions of the *Robinson* opinion are set out in the Appendix, pp. 13a-14a, 53a-57a. The affidavits alleged that Judge Hand had, through extra-judicial sources, formed the opinion that plaintiffs in civil rights actions

[2] See *NAACP* v. *Button*, 371 U.S. 415, 421, n. 5 (1963); the Legal Defense Fund has been involved in numerous cases before this Court, including *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

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who were represented by Mr. Blacksher and/or Legal Defense Fund attorneys did not have valid grievances, but had been solicited by the attorneys to present unwarranted claims to further various unconscionable purposes of the attorneys. Judge Hand was thus alleged to be biased against petitioners Foster and Buskey and unwilling to judge their claims on the basis of the facts adduced at trial or the applicable law.

Judge Hand denied the motions, partly on the basis that, as a matter of fact, he was not biased. The district judge certified the question to the court of appeals under 28 U.S.C. § 1292(b), pp. 1a-4a, and the court granted petitions for leave to file interlocutory appeals. On August 21, 1975, a panel of the court of appeals affirmed Judge Hand's refusal to recuse himself on the ground that, regardless of whether the affidavits in fact demonstrated bias or the appearance of bias, the affidavits were legally insufficient. *First*, the court held that a party could not base recusal on actions taken or statements made by a judge in court, but could only rely on extra-judicial events. Since the evidence of Judge Hand's prejudice consisted of in-court statements, that evidence was subject to the court's exclusionary rule, even though the statements relied upon occurred in an entirely separate case. *Second*, the court held that evidence of bias or prejudice directed at a party's lawyers also could not be considered, and since the evidence itself was inadmissible it could not be relied upon to infer that a judge implacably hostile to an attorney might, for that reason, be or appear to be less than fair to his clients. Pp. 9a-13a. A timely petition for rehearing was denied on October 2, 1975.

B. *Parrish v. Board of Bar Commissioners*

Parrish is an action brought under 42 U.S.C. §§ 1981 and 1983, charging that the Board of Examiners of the Alabama State Bar, its members and officials, had, both intentionally and because of the effect of bar examinations and their method of administration, discriminated against black applicants for admission to the bar. The case arose in the Middle District of Alabama and was assigned to Judge Robert E. Varner.

During the preliminary phases of the litigation questions arose concerning Judge Varner's impartiality; to clarify the matter Judge Varner submitted to questions by counsel for plaintiff at a hearing held for this purpose. Appendix pp. 24a-25a. In that testimony Judge Varner acknowledged his personal friendship with most of the defendants, and his confidence in the veracity and integrity of key defense witnesses. Promptly after this hearing plaintiffs filed a motion and affidavit under 28 U.S.C. § 144 to recuse Judge Varner. Plaintiffs urged, *inter alia*, that both Judge Varner's recent leadership role in a bar association that excluded blacks, and his preconceived and extra-judicial belief in the veracity of defendants in a case where their credibility as to intentional discrimination would be a major issue, required that he disqualify himself.

The District Judge declined to recuse himself. Shortly thereafter he granted defendants' motion for summary judgment. Plaintiffs' claim that the defendants had engaged in intentional racial discrimination in administering the state bar examination was denied on the ground, *inter alia*, that the defendants had submitted conclusory affidavits denying it. An appeal from the final order granting summary judgment and dismissing the complaint was taken, and the recusal question was one of the issues presented on appeal.

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On December 12, 1974, a panel of the Fifth Circuit (Judges Tuttle, Wisdom, and Gee), reversed the refusal of Judge Varner to recuse himself in *Parrish*. Appendix, pp. 19a-35a. On February 20, 1975, the court of appeals *sua sponte* withdrew its opinion, 509 F.2d 540; on June 5, 1975, it informed the parties that it had, also *sua sponte*, decided to hear *Parrish en banc*, and invited the parties to file additional briefs.[3] On December 4, 1975, the court issued its *en banc* decision in *Parrish*. The majority opinion written by Judge Bell, the author of the panel decision in *Davis*, concluded that neither § 144 nor § 455 required recusal.[4] Four judges concurred specially and three dissented. Pp. 36a-52a.

Reasons for Granting the Writ

This case arises out of the most recent attempt by Congress to tighten the standards as to when a federal judge must recuse himself from a case.

The first such statute, adopted in 1792 to overcome the manifest inadequacy of the common law regarding recusal, authorized disqualification on a number of specified grounds.[5] The succeeding versions of this provision existed until 1974 as 28 U.S.C. § 455. Over the years the lower courts so narrowed the applicability of these enumerated grounds,[6] so broadened the discretion of judges in

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[3] The case was not set for reargument *en banc*.

[4] Section 3 of the Act amending § 455 provides that the amendments apply to any appeal which had not been fully submitted to the appellate court prior to December 5, 1974. Briefs were filed in both *Parrish* and *Davis* subsequent to that date. See p. 41a.

[5] 1 Stat. 278.

[6] Note, 57 Minn. L.Rev. 749, 752 (1973).

applying the statute,[7] as to render the statute largely ineffective.

This process of emasculation led Congress to adopt in 1911 the provisions now codified as 28 U.S.C. § 144.[8] Section 144 provides that a judge must disqualify himself upon the filing of an affidavit by the party stating that he believes the judge to be biased or prejudiced and stating the reasons for the affiant's belief. In 1921 this Court handed down its only construction of section 144 in *Berger* v. *United States,* 255 U.S. 22 (1921), which directed that a judge with a firm belief in the disloyalty of German emigrants disqualify himself from presiding at a trial of German-Americans charged with espionage. This Court, reading section 144 literally and in light of its legislative purpose, held that the "facts and reasons" in the required affidavit need not prove the judge was in fact biased, but need only have a reasonable relation to the affiant's belief and be neither "frivolous [n]or fanciful". 225 U.S. at 33-34. The policy underlying the statute was stated to be "that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial." 255 U.S. at 35-36. In *Public Utilities Commission* v. *Pollak,* 343 U.S. 451, 466-67 (1952) Mr. Justice Frankfurter disqualified himself out of a concern "that the administration of justice should reasonably appear to be disinterested as well as to be so in fact." In 1968 this Court concluded that, as a matter of "constitutional principle", "any tribunal permitted by law to try

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[7] Frank, "Disqualification of Judges", 56 Yale L.J. 605, 628 (1947).

[8] The congressional debates leading to the enactment of section 144, 36 Stat. 1090, were expressly directed at the defects of section 455 as it then existed.

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cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145, 150 (1968). In the lower courts, however, the efficacy of section 144 was steadily eroded by a series of judicially fashioned exceptions and technicalities and an increasingly open refusal to adhere to the standard set in *Berger* itself.[9]

The most recent legislation, Pub. L. 93-512, which is the subject of this petition, arose out of a series of controversies regarding actual or proposed members of this Court.[10] In the course of that controversy the American Bar Association in 1969 appointed a committee to review generally the standards of judicial conduct.[11] In June, 1970, the ABA committee circulated a draft Standards of Judicial Conduct which, with regard to recusal, expanded the specific categories of situations requiring disqualification. In July legislation was proposed in the Senate to modify section 455 by incorporating a similar enumeration, but adding a broadly worded provision requiring disqualification in any case where participation would "create an appearance of impropriety."[12] In the

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[9] See p. 46a; Note, 57 Minn. L.Rev. 749, 755 (1973).

[10] See Shogan, A Question of Judgment (1972); 115 Cong. Rec. 34049, 34268, 34275, 34287, 34375, 34425, 34432, 34450, 34553, 34597, 34825, 34843, 34861, 35120, 35130, 35368, 35395, (1969); S. Exec. Rep. No. 91-92, 91st Cong., 1st Sess. (1969); Frank, "Disqualification of Judges," 35 Law and Contemp. Probs. 43, 60-61 (1970); Hearings Before the Senate Judiciary Committee on a Nomination to the United States Supreme Court, 91st Cong., 2d Sess., 41, 49-50 (1970); Hearings Before the Senate Judiciary Committee on Nominations to the United States Supreme Court, 92nd Cong., 1st Sess., 49-50, 60-61, 73-74, 203-05 (1971).

[11] Frank, "Disqualification of Judges", 35 Law and Contemp. Probs 43, 62 (1970).

[12] *Id.*, 63, 68.

ensuing debate within the ABA committee the Senate proposal for such a catch-all clause was accepted, and Canon 3C(1) prefaced the enumeration of specific circumstances requiring disqualification with the words "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: . . . ." The Reporter's Notes relied on *Commonwealth Castings,* and stressed that "Although the specific standards cover most of the situations in which disqualification will arise, the general standard should not be overlooked."[13] The new Canons were adopted by the ABA in 1972, and by the Judicial Conference of the United States in April 1973. Legislative proposals by various Senators resulted, in December, 1974, in the adoption of a comprehensive new version of section 455 which is substantially identical to Canon 3C, except for the addition of subsection (b)(3) which deals with the recusal problem discussed in *Laird* v. *Tatum,* 409 U.S. 824 (1972).[14] Section 455(a) contains the broad language sought since 1970 by the Senate sponsors requiring a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questoned."[15]

Parrish and *Davis* are the first decisions construing and applying section 455. In both cases the issue of recusal arose at a preliminary stage when an appellate decision in favor of recusal would not require a retrial, and in both instances, of course, there were available to hear the case other federal judges whose background would not raise the troublesome question posed by Judges Varner and

[13] Reporter's Notes to Code of Judicial Conduct, 60 (1973).

[14] See S.Rep. No. 93-419, p. 6 (1973).

[15] See *id.*, p. 5.

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Hand. Petitioners maintain that the decisions of the court of appeals have, within a year of its adoption, virtually nullified the new section 455.

Section 455 was intended to overcome the problems which had rendered section 144 ineffective by adopting in subsection (a) a broad disqualification requirement with absolutely no limitations as to type of potential bias, source of potential bias, or procedure. The Senate sponsor urged that section 455 was necessary because "No statute creates more distrust than does the section 144 procedure for disqualification".[16] *Davis* overcomes this legislative plan by the simple expedient of expressly reading into section 455 every limitation it believes existed under section 144. The indisputable evidence in *Davis* reveals that Judge Hand in the *Robinson* case expressed implacable hostility to civil rights litigants represented by Mr. Blacksher and Legal Defense Fund attorneys, characterizing their efforts to enforce federal civil rights laws as "perfidy". Pp. 56a-57a. Plaintiffs in the *Davis* case filed a detailed affidavit documenting the reasons for their belief that Judge Hand regarded them and all other parties represented by Blacksher as having grievances that were invalid and unwarranted. Pp. 13a-14a. It cannot be seriously questioned that, in the literal terms of that statute, a reasonable man could doubt the impartiality of Judge Hand in civil rights cases handled by Mr. Blacksher and his associates. The Fifth Circuit avoided this otherwise inescapable conclusion by holding that none of the evidence on which petitioners rely is legally "available."

The court of appeals adopted from its reading of section 144 case law two distinct exclusionary rules prohibiting consideration of evidence that a judge is prejudiced against a party's counsel or of evidence coming to light in,

[16] Hearings Before a Subcommittee of the Senate Judiciary Committee on S.1064, 93rd Cong., 1st Sess., 13 (1973).

or of prejudice due to events in, any judicial proceeding. The court did not deny that a reasonable man could sensibly not fear that a judge would vent his hostility towards a lawyer on the lawyer's clients, or that reasonable men in assessing a judge's impartiality would consider how the judge conducted himself in court. The court of appeals reasoned, rather, that the Congress which repealed the old section 455 and regarded section 144 as ineffective intended to apply to the new section 455 the gloss which some lower courts had used to debilitate section 144. Nothing in the language or legislative history of section 455(a) suggests any such congressional intent to so emasculate that statute. Moreover, the Fifth Circuit's conclusion that such evidence was inadmissible prior to section 455 is inconsistent with this Court's decisions in *Berger*, which involved evidence of prejudice arising in judicial proceeding, and *Johnson* v. *Mississippi*, 403 U.S. 212, 215 (1971), which relied heavily on evidence that the judge in that case was prejudiced against a party's attorney. See also *Mayberry* v. *Pennsylvania*, 400 U.S. 453 (1971); *Reserve Mining Co.* v. *Lord*, —— F.2d —— (8th Cir. 1976).

In *Parrish*, unlike *Davis*, the court of appeals held the evidence adduced was admissible, but applied a standard as to when impartiality can be questioned so high that it cannot be met in virtually any conceivable case. The request for recusal in *Parrish* is grounded upon five factors, any one of which should be sufficient to require a judge to step aside. First, the judge candidly conceded his belief that the key defense witness, the Secretary of the Commission, a close personal friend of the judge, would not lie.[17] Second, the judge was admittedly a close per-

[17] "I think Mr. Scott is an honorable man . . . . I think he would try to tell you the truth in his answers." Transcript of Hearing of December 22, 1972, p. 21. The testimony of Scott is critical to the issue of whether the Commissioners could have known the race of the applicants whose tests they were grading.

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sonal friend of two of the defendants, and acquainted with at least 7 of the other defendants, but did not know any of the plaintiffs.[18] Third, since the judge was a member of the defendant Bar Association, which is dependent for its funds on assessments of its members, he faced indirect personal liability for any costs, counsel fees or damages that might be awarded to plaintiffs. P. 43a. Fourth, there were serious questions as to whether the judge had, only a few years earlier, supported or condoned racial discrimination by the Montgomery County Bar Association similar to that alleged to have been practiced by the state bar association. Pp. 43a, 49a. Fifth, the attorney who represents the defendants in this case is also representing Judge Varner in connection with an investigation of the conduct of Judge Varner in an unrelated case.[19] The *en banc* majority in *Parrish* concluded that, despite this extraordinary combination of circumstances, a reasonable man could not reasonably question Judge Varner's impartiality. P. 42a.

If there was ever a period in American jurisprudence when reasonable men would not doubt the fairness of a judge in such a case,[20] "the times have changed".[21] Past

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[18] *Id.*, pp. 6, 8, 20-21.

[19] This circumstance arose while *Parrish* was pending on appeal and bears on whether Judge Varner should sit when the case is remanded for further proceedings.

[20] Admittedly the standards were rather lax in the eighteenth century. See Frank, "Disqualification of Judges", 35 Law and Contemp. Probs 43, 44 (1970).

[21] Hearings Before the Senate Judiciary Committee on a Nomination to the United States Supreme Court, 91st Cong., 2d Sess., 41 (1970). (Statement of Mr. Justice Blackmun) Regarding the "evolving standards" as to when a judge should withdraw from a case, Mr. Justice Blackmun reiterated "I think the times have changed a great deal in the past 5 years and I would not say for the worse by any means."

practice in this Court suggests that no member of the Court would participate in a decision in this case if he bore the same relationship to the defendants, the defense witnesses, and the defendants' attorney as did Judge Varner. The district judge's personal knowledge of the veracity of the key defense witnesses would doubtless render him an ideal character witness,[22] but section 455(b)(1) forbids a judge from sitting in any case where he has such "personal knowledge of disputed evidentiary facts." Compare *Laird* v. *Tatum*, 409 U.S. 824, 826-7 (1972) (Rhenquist, J.).[23] As a member of the defendant Bar Association the judge also has financial "interest that could be substantially affected by the outcome of the proceeding." Section 455(b)(2).[24] Compare *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813).[25] For Judge Varner to sit in a case where his personal lawyer represented one of the parties would be to raise the same type of question of possible bias as would exist if he heard a case in which his

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[22] Federal Rules of Evidence, Rule 608. Of course Canon 2 forbids a judge from testifying voluntarily as a character witness. See Reporter's Notes to Code of Judical Conduct, p. 49 (1973). It would be incongruous, to say the least, if the Canons forbade a judge from being a voluntary witness in such a case but did not preclude him from volunteering to adjudicate it.

[23] This rule is constitutionally required. *In re Murchison*, 349 U.S. 133, 138 (1954), forbade a judge who had sat as a one-man grand jury from trying a prosecution for contempt because he had "personal knowledge and impression of what occurred in the grand jury room."

[24] This may not constitute a "financial interest" within the meaning of section 455(d)(4), but section 455(b)(4) includes not only financial interests but "any other interest", a category expressly intended to have "a broad sweep". Reporter's Notes To Code of Judicial Conduct, 66 (1973).

[25] Regarding the nature of Chief Justice Marshall's interest see Frank, "Disqualification of Judges", 35 Law and Contemp. Probs. 43, 45 (1970). This rule is also constitutionally mandated. *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

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son was of counsel.[26] The partiality of any judge would clearly subject to question in a case in which one of the parties, or a victim of the crime involved, was a personal friend.

It is difficult to believe that the draftsmen of the amended section 455 would have been less than astonished at the suggestion that, after five years of congressional debate and the enactment of the most sweeping recusal statute in the history of the federal courts, Judges Varner and Hand could still sit in these cases. In the face of the decisions below section 455 is virtually a dead letter in the Fifth Circuit. *Davis* is likely to exclude most relevant evidence of potential bias, and whatever is admissible is likely to be less persuasive than the facts in *Parrish*. This Court should not permit a salutary enactment designed to substantially broaden the circumstances requiring recusal to be so nullified in less than a year after it enactment by Congress.

In amending section 455 Congress was concerned with more than the rights and interests of particular litigants. The disputes regarding nominations to this Court reflected a conviction that it is "quite important for the public to have confidence in the members of the Court that they have no interest other than to do justice under law."[27] Both the House and Senate reports stressed that general language of the new section 455 was "designed to promote public confidence in the impartiality of the judicial process."[28] See Code of Judicial Conduct, Canon 2 (A).[29] The

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[26] The evolving standard applied by members of this Court in that situation is discussed in Frank, "Disqualification of Judges", 35 Law and Contemp. Probs. 43, 46-48 (1970).

[27] Hearings Before the Senate Judiciary Committee on Nominations to the United States Supreme Court, 92nd Cong., 1st Sess., 204 (1971) (Statement of Mr. Justice Powell).

[28] S. Rep. No. 93-419, 5 (1973); H.R. Rep. 93-1453, p. 5 (1974).

[29] "A judge should . . . conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

willingness of disputing parties to submit their disagreements to the judiciary for resolution, to cooperate with and facilitate the established judicial procedures, and to acquiesce in the conclusions reached by those tribunals, depends above all on their belief that the judges will act impartially. It is for this reason that the effective administration of justice requires of all judges who may hear a case that they "be fair and that they appear to be fair—to the [parties], to those who are deeply interested in [their] future, and to the public at large." *United States* v. *Rosciano*, 499 F.2d 173, 175 (7th Cir. 1974) (Stevens, J., dissenting). To permit Judges Hand and Varner to continue to sit in these cases would be inimical to the public confidence which Congress was intent upon restoring.

The decisions below are also squarely inconsistent with this Court's decision in *Berger*. *Berger* held that an affidavit would be sufficient for purposes of section 144 if the facts alleged provide a reasonable basis for the affiant's belief that the judge is prejudiced against him. 255 U.S. at 33-34. The dissenters in the *Parrish, en banc* decision, who were the original majority in the panel decision, expressly adhered to this "subjective" standard. Pp. 31a-35a. The panel in *Davis* and the *en banc* majority in *Parrish* insisted that the affidavit must demonstrate that the judge is in fact biased. Pp. 10a-12a, 40a. Judge Gee, specially concurring in *Parrish*, attacked *Berger* as "an outdated rule", expressed his conviction that this Court would decide *Berger* otherwise today, and urged the court of appeals to openly disregard that decision. Pp. 44a-47a. As of now the circuits are divided on whether *Berger* is still good law. Four circuits adhere to *Berger*, holding an affidavit sufficient if it gives fair support to the affiant's belief,[30] four

[30] *United States* v. *Tropiano*, 418 F.2d 1069, 1077 (2d Cir. 1969); *United States* v. *Thompson*, 479 F.2d 1072, 1073-74 (3d Cir. 1973); *Government of Virgin Islands* v. *Gereau*, 502 F.2d 914, 932 (3d Cir. 1974); *United States* v. *Ming*, 466 F.2d 1000, 1004 (7th Cir. 1972); *Botts* v. *United States*, 413 F.2d 41 (9th Cir. 1969).

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circuits, including the Fifth, now require the affidavit to prove prejudice in fact,[31] and two circuits, while rephrasing *Berger*, have nonetheless rejected any requirement that bias be proven.[32] This broad conflict as to the vitality of *Berger* is sufficient, in and of itself, to require a grant of certiorari.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgments and opinions of the Fifth Circuit.

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[31] *United States* v. *Bell*, 351 F.2d 868, 879 (6th Cir. 1965); *Pfizer* v. *Lord*, 456 F.2d 532, 537 (8th Cir. 1972); *Antonello* v. *Wunsch*, 500 F.2d 1260 (10th Cir. 1974).

[32] *In re Union Leader Corp.*, 292 F.2d 381, 389 (1st Cir. 1961); *Gallarelli* v. *United States*, 260 F.2d 259, 261 (1st Cir. 1958); *Whitaker* v. *McLean*, 118 F.2d 596 (D.C. Cir. 1941).

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